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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-17**

UNITED GAS PIPE LINE COMPANY,
Petitioner,

**BILLY J. McCOMBS, R. JAMES STILLINGS, d b a GASTILL
COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM
CORPORATION, E. I. DU PONT DE NEMOURS & COM-
PANY, BILL FORNEY, and FEDERAL ENERGY REGU-
LATORY COMMISSION,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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July 3, 1978

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IN THE
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No.

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, R. JAMES STILLINGS, d/b/a GASTILL
COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM
CORPORATION, E. I. DU PONT DE NEMOURS & COM-
PANY, BILL FORNEY, and FEDERAL ENERGY REGU-
LATORY COMMISSION,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Petitioner United Gas Pipe Line Company ("Uni-
ted") respectfully prays that a writ of certiorari issue
to review the judgment and opinion of the United
States Court of Appeals for the Tenth Circuit entered
in this proceeding on February 9, 1978, and that the
decision below be summarily reversed.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals is reported at 570 F.2d 1376. A copy is appended to this petition.¹

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1978. (A. 94.) An order denying petitions for rehearing and suggestions for rehearing in banc filed by United and the Federal Energy Regulatory Commission ("Commission")² was entered on April 4, 1978. (A. 95.) The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Section 7(b) of the Natural Gas Act provides there can be no abandonment of certificated natural gas service to interstate commerce without the permission and approval of the Commission first had and obtained after due hearing and a prescribed finding by the Commission. The question here is whether an abandonment of a producer's certificated sale of natural gas is nevertheless effected, without any Commission hearing, finding or order, by the fact that gas production ceases from all the reserves then known to exist on the dedicated acreage.

¹ The opinion below and the text of Section 19(b) of the Natural Gas Act are attached to this petition and are cited as "O". Other materials required to be appended under Rule 23 are set out in a separate printed Appendix and are cited as "A."

² "Commission" is used herein to refer both to the Federal Energy Regulatory Commission and to its predecessor, the Federal Power Commission.

STATUTES INVOLVED

Principally involved is Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides:

Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Also involved is Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), which, because of its length, is separately appended. (O. 16.)

STATEMENT OF THE CASE

A. Nature of the Case

As in this Court's recent decision in *California v. Southland Royalty Co.*,³ the issue here is whether a natural gas producer's certificated service obligation has terminated without Commission approval of abandonment pursuant to Section 7(b) of the Natural Gas Act. In this case, the court below held that when production ceased from the known reserves on the lease in question there was an abandonment even in the absence of Commission authorization. The issue is important to the Commission's administration of the Act because the court below held that the requirements of Section 7(b) were not applicable here, thus bypassing

³ 46 U.S.L.W. 4539 (1978).

the Commission's authority to withhold or condition abandonment approval. The issue also has enormous practical importance because of its impact upon the status of acreage subject to gas dedications to interstate commerce where production has ceased but no abandonment has been approved by the Commission.

B. Facts

The sole issue involved here is one of law. The pertinent facts are not in dispute.

On May 20, 1948, W. R. Quin obtained an oil and gas lease (the Butler B lease) covering approximately 163 acres in Karnes County, Texas. On April 29, 1953, Bee Quin, his widow, entered into a gas purchase contract with United, agreeing to sell to United the natural gas production from or attributable to certain leaseholds, including the Butler B lease.⁴ There was no depth limitation in the lease or in the contract.

Following this Court's decision in *Phillips Petroleum Co. v. Wisconsin*,⁵ Mrs. Quin applied to the Commission for certificates of public convenience and necessity authorizing the sale of the natural gas covered by the 1953 contract in interstate commerce to United. Her applications were granted by orders issued December 8, 1954 and December 14, 1954 in Docket Nos. G-2997 and G-2998, respectively. United installed a gathering facility and an above-ground field measuring station on the Butler B tract and received natural gas for its interstate pipeline system pursuant to the certificates issued to Mrs. Quin.

⁴ The contract also covered the Butler A lease referred to in the opinion of the court below.

⁵ 347 U.S. 672 (1954).

By a succession of transfers,⁶ a group headed by Louis H. Haring became owner of the leasehold interest in the Butler B tract. On May 28, 1966, production ceased from the Butler No. 7 gas well, which was the only well producing gas on the lease at that time. Thereafter, Bay Rock Corporation, as operator for the Haring group, wrote United that the existing gas wells were depleted and that no other gas would be available at that time. On December 7, 1966, United advised Bay Rock that it intended to remove a portion of its gathering facilities for use elsewhere on its system but that such equipment would be reinstalled "[i]f, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the above captioned contract."

Thereafter, no additional natural gas was produced from the Butler B lease until 1971. However, in August 1966, Bay Rock drilled a producing oil well, thereby keeping the Butler B lease in effect. In August 1968 and January 1971, letters from the Secretary of the Commission were sent to the producers advising them that if no further sales of gas were contemplated, it would be necessary for them to file applications to abandon service. (A. 97, 100.) The producers, however, never attempted to secure Commission approval for abandonment, nor did they raise the issue with United.

In 1971 and 1972, Haring assigned his working interest rights in certain deep horizons underlying the Butler B lease to National Exploration Company and to the Respondents known as the McCombs Group. In 1971 the new working interest owners discovered gas

⁶ The first successor to Mrs. Quin was H. A. Pagenkopf. (See A. 5-6, 97-99.) The Commission issued Pagenkopf a successor in interest certificate on June 19, 1963 in Docket No. G-12694.

in lower horizons. Thereafter, notwithstanding objection by United, the McCombs Group commenced selling, and has continued to sell, all the new gas production attributable to the Butler B lease to Respondent E. I. du Pont de Nemours & Company ("du Pont") in intrastate commerce.

C. Proceedings Before the Commission

Acting on a complaint by United, the Commission in Opinion No. 740, issued August 20, 1975, found that the service from the Butler B lease had been initiated as authorized, so that production from the Butler B tract was dedicated to interstate commerce. (A. 1, 29-36.) The Commission held that, since there had been no abandonment under Section 7(b), the Butler B gas was required to be delivered to United and that the sales of gas in intrastate commerce were in violation of Section 7.⁷

D. Proceedings in the Court Below

The McCombs Group and du Pont petitioned the United States Court of Appeals for the Tenth Circuit for review of the Commission's determination.⁸ Pending review, the court stayed the effect of the Commission's order so that subsequent gas production from the Butler B lease has all been sold in intrastate commerce.

⁷ In Opinion No. 740-A, issued November 7, 1975, the Commission denied rehearing. (A. 46.) On January 19, 1976, the Commission issued Opinion No. 740-B dealing with issues not involved in this petition. (A. 70.)

⁸ Jurisdiction was based upon Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

On October 18, 1976, the Tenth Circuit issued its initial decision in which it reversed the Commission.⁹ (A. 81.) On petitions for rehearing by both United and the Commission, the court on October 18, 1977, withdrew and vacated its first opinion and judgment. (A. 92-93.)

On February 9, 1978, the court, with one judge dissenting, entered its opinion and judgment on rehearing reaching the same result as in its previous opinion. The majority held that since production had ceased in 1966 from all gas reservoirs then known to exist, "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission." (O. 9.) Judge Holloway dissented on the ground that the Section 7(b) procedures are mandatory.¹⁰ (O. 12-15.)

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE COURT BELOW IS IN CONFLICT WITH THE PLAIN TERMS OF THE STATUTE AND WITH THE DECISIONS OF THIS COURT.

A. Section 7(b) Unambiguously Requires a Commission Hearing, a Specified Finding and Commission Approval Before Certificated Natural Gas Service Can Be Abandoned.

The terms of the statute are plain. Section 7(b) provides without qualification that there shall be no abandonment without permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission as defined in that section.

⁹ *McCombs v. FPC*, 542 F.2d 1144 (10th Cir. 1976).

¹⁰ On April 4, 1978, the court denied petitions by United and the Commission for rehearing and suggestions for rehearing in banc. (A. 95.)

B. The Decisions of this Court Confirm that Commission Approval Pursuant to Section 7(b) is a Mandatory Prerequisite to Abandonment.

This Court has consistently held that abandonment of certificated natural gas service can be effected only upon compliance with the provisions of Section 7(b). As early as its decision in *Atlantic Refining Co. v. Public Service Commission of New York*,¹¹ this Court held that once a gas supply is dedicated to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval."¹² In *United Gas Pipe Line Co. v. FPC*,¹³ this Court held that for abandonment, "[t]he statutory necessity of prior Commission approval, with its underlying findings, cannot be escaped."¹⁴ In its recent decision in *Southland Royalty, supra*, the Court held:

Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of 'any service rendered by means of such facilities.'¹⁵

The reason for the Court's consistent adherence to this principle is clear. The Commission's authority to permit or withhold abandonment has always been recognized as a key element in the "comprehensive and effective regulatory scheme"¹⁶ established by the Nat-

¹¹ 360 U.S. 378 (1959).

¹² *Id.* at 389.

¹³ 385 U.S. 83 (1966).

¹⁴ *Id.* at 89.

¹⁵ 46 U.S.L.W. at 4540-41.

¹⁶ *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana*, 332 U.S. 507, 520 (1947).

ural Gas Act. For example, in *Sunray Mid-Continent Oil Co. v. FPC*,¹⁷ this Court held that the Commission was empowered to require producers to accept certificates of unlimited duration as a condition to their commencing to sell gas in interstate commerce. The Court reasoned that, if natural gas companies were able to limit the duration of the service obligation they undertook, it would undermine the Commission's authority to control the terms of that service. It was essential for the Commission to be able to ensure that natural gas producers could not cease certificated service except on the terms provided in Section 7(b).

In *Sunray*, this Court discussed the very situation that has arisen in this case. In so doing, it made it clear that Section 7(b) hearings and findings are necessary prerequisites to abandonment, even though there has been a cessation of production from the reserves known to exist:

It might be observed that in these cases the Commission issued certificates without time limitations. Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.¹⁸

The holding of the court below is in direct conflict with this statement.

In *Southland Royalty, supra*, the Court held that abandonment authorization was necessary before de-

¹⁷ 364 U.S. 137 (1960).

¹⁸ 364 U.S. at 158n. 25 (emphasis added).

liveries of gas in interstate commerce could cease despite the expiration of the lease of the producer to whom the certificate had been issued. The decision emphasizes the importance attached by this Court to insuring that the Commission may "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease."¹⁹

In short, this Court has made it clear that Section 7(b) is a key provision in the regulatory structure established by the Natural Gas Act, because it is Section 7(b) that assures that no certificated interstate natural gas service is abandoned without the Commission's express approval.²⁰ Accordingly, this Court's

¹⁹ 46 U.S.L.W. at 4540. Other decisions of lower courts are in accord with this Court's in holding that Section 7(b) Commission approval is necessary for abandonment. *E.g.*, *Reynolds Metals Co. v. FPC*, 534 F.2d 379, 384-85 (D.C. Cir. 1976); *Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670, 677 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973); *J. M. Huber Corp. v. FPC*, 236 F.2d 550, 558 (3d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957).

²⁰ As noted in *Sunray Mid-Continent Oil Co. v. FPC*, *supra* at 141-42, Section 7(b) of the Natural Gas Act "follows a common pattern in federal utility regulation." Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), similarly provides that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Like the decisions under Section 7(b), the decisions under this provision uniformly hold that strict compliance with the statutory requirements is necessary to effect an abandonment and that only the Commission may in the first instance determine whether an abandonment is consistent with the present or future public convenience and necessity. *Smith v. Hoboken R.R., Warehouse & S.S. Connecting Co.*, 328 U.S. 123, 129-30 (1946); *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 144-46 (1946); *ICC v. Chicago, R.I. & Pac. R.R.*, 501 F.2d 908,

decisions have made it clear that the Section 7(b) requirements are mandatory. The lower court's ruling, which holds to the contrary, is in conflict with these decisions.

C. The Decision Below Invades the Commission's Jurisdiction and Undermines the Commission's Authority to Administer the Natural Gas Act Effectively.

The court below held that the Section 7(b) requirements can be bypassed when the known facts make it appear that there is no more gas available from a particular tract. However, the statute expressly allocates to the Commission—not the courts—the responsibility to make the factual determination under which an abandonment will be permitted. As Judge Holloway pointed out in his dissent, the majority holding is "directly contrary to the plain terms of § 7(b)." (O. 12.)

It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does the determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b).²¹

The majority opinion of the court below undermines the Commission's authority to control the terms and conditions upon which gas producers may terminate certificated natural gas service. For in ^{the} view of the

913-14 (8th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532, 536 (2d Cir. 1958); *ICC v. Baltimore & A. R.R.*, 398 F.Supp. 454, 461 (D.Md. 1975), *aff'd*, 537 F.2d 77 (4th Cir.), *cert. denied*, 429 U.S. 859 (1976).

²¹ O. 13 (emphasis in original).

court below, the cessation of production from the known reserves on dedicated acreage would automatically result in an abandonment—and hence, the termination of the Commission's jurisdiction—without any finding or approval by the Commission. This would seriously impair the Commission's ability to carry out its statutory responsibility of assuring "an adequate and reliable supply of gas at reasonable prices."²² The Commission would be left without the means to confirm that the producer did all that was required to maintain production from the old reserves. Similarly, the Commission would be denied the opportunity to determine how likely or unlikely was the possibility of production from the deeper horizons in light of geological information available at the time production from the shallow reserves ceased.²³

²² *California v. Southland Royalty Co.*, *supra* at 4540.

²³ The court below quoted extensively (O. 6-7) from the opinion it had previously withdrawn. The excerpts quoted, although not part of the court's holding, contain the suggestion that abandonment was effected under Section 7(b) when the Secretary of the Commission sent certain letters to the producers. The letters themselves, which were never made part of the record, are set out in their entirety in the Appendix. (A. 97-98, 100-01.) But they clearly could not have effected a Section 7(b) abandonment. They were simply inquiries from the administrative officer of the Commission prompted by the fact that the producers were reporting no deliveries from the dedicated acreage. Actions by the Secretary of the Commission are not binding; rather, only the institutional decisions of the agency—i.e., decisions by a majority vote duly taken—are entitled to legal significance. *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 146 (1946) (action by Secretary of Interstate Commerce Commission not binding upon the Commission); *Minneapolis & St. Louis R.R. v. Peoria & Pekin Union Ry. Co.*, 270 U.S. 580, 585 (1926) (action by Chairman of Interstate Commerce Commission not binding upon the Commission); *Public Serv. Comm'n of New York v. FPC*, 543 F.2d 757, 776-77 (D.C. Cir. 1974) (only

The majority opinion of the court below seems to assume that if an abandonment application had been brought after the old reservoirs ceased to produce but before the new production was established, the Commission would have been compelled to authorize abandonment. But this is not so. A similar situation was recently before the Commission in *Texaco, Inc., et al.*, FERC Docket Nos. G-8820, *et al.* There the Commission refused abandonment because the producer did not show that the lease had been explored to a point such that a definitive finding could be made that no additional gas reserves could be expected to be found through further exploratory efforts.²⁴ In holding that the cessation of production in and of itself effected abandonment, the court below would preclude the Commission from considering the possibility of production from deeper but untested reservoirs in making its determination under Section 7(b) whether "the available supply of natural gas is depleted."

Since the producers never sought Commission abandonment authorization here, the Commission never had the chance to make any evaluation whether the reserves were in fact exhausted or whether there might be additional reservoirs at lower depths. Indeed, because there now *is* production from deeper reservoirs, it is clear that the lease was *not* exhausted in 1966. It is indeed ironic that the court below relied heavily upon the assumption that the Commission would have been com-

institutional decisions of Federal Power Commission entitled to legal significance). Moreover, the letters do not even approach fulfillment of the hearing and finding requirements of Section 7(b).

²⁴ Order Granting Petition for Reconsideration and Modifying Prior Order, issued November 1, 1977, mimeo at 3.

pelled to make a finding that is now known to be incorrect.²⁵

In any event, Section 7(b) expressly charges the *Commission* with the responsibility of determining whether "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted." By making its own finding on abandonment, the court below not only impermissibly usurped the Commission's responsibility expressly conferred under Section 7(b), but it also exceeded the bounds of its reviewing authority under Section 19(b) of the Act.²⁶

If allowed to stand, the decision of the court below would create considerable uncertainty as to whether abandonment of particular acreage has occurred or not. Abandonment would not be dependent upon a Commission order—a readily identifiable point of reference—but upon the actual or assumed depletion of the dedicated reserves. It would often be unclear whether a particular set of facts resulted in abandonment. For example, the court below emphasized the five-year period that had elapsed between the date of the last production from the shallow reserves and the new production from the deeper horizons. If this is a factor, it introduces an additional element of uncertainty, since

²⁵ The decision below is ironic in other respects as well. Although the producers here had an opportunity to seek abandonment once the shallow reserves ceased to produce, they chose not to do so. Now that production has been restored, it is clear that abandonment is not warranted. However, the lower court's decision places the burden for failure to comply with the Section 7(b) requirements, not upon the producers who omitted to comply with them, but upon the interstate consumers for whose protection they were enacted.

²⁶ *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-34 (1976).

it is unclear how long the interval must be before the abandonment is effected.

Moreover, the lower court's decision deprives other parties (*e.g.*, pipeline purchasers and gas consumers) of the right to be heard in determining whether abandonment should be granted. Indeed, the power to effect abandonment would be to a large extent within the control of the producer. This is contrary to the mandate of Section 7(b) and the decisions of this Court.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN *MITCHELL ENERGY CORP. v. FPC*.

In *Mitchell Energy Corp. v. FPC*,²⁷ the Fifth Circuit, upholding the Commission, ruled that gas from reservoirs not known to exist at the time of the original certificate was nevertheless dedicated to interstate commerce and subject to the Section 7(b) abandonment requirements. The court held that since all available gas in the field was subject to the producer's certificate and the service obligation related thereto, "until relieved of that obligation by appropriate action of the Commission, Mitchell must continue to put in interstate commerce all the gas produced" from the field.²⁸

The decision below, in holding that the deeper reservoirs were not subject to the Section 7(b) abandonment requirements, is in conflict with *Mitchell Energy*. The fact that in *Mitchell Energy* the new production was discovered before the original production ceased, rather than afterwards, has no logical bearing on the question whether a Section 7(b) Commission proceed-

²⁷ 533 F.2d 258 (5th Cir. 1976).

²⁸ *Id.* at 261.

ing is a prerequisite to release of the deeper reserves from commitment to interstate commerce.

CONCLUSION

For all of the reasons set forth above, United respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Tenth Circuit in this case. Moreover, because the decision below is so clearly at odds with the decisions of this Court on the interpretation of Section 7(b) of the Natural Gas Act, United requests that it be summarily reversed and the case remanded for determination of the issues not yet decided.

Respectfully submitted,

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July 3, 1978

APPENDIX

OPINION OF THE COURT OF APPEALS AND SECTION 19(b) OF THE NATURAL GAS ACT

O-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. MCCOMBS, R. JAMES STILLINGS, d/b/a GASTILL
COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM COR-
PORATION, E. I. DU PONT DE NEMOURS & COMPANY, and
BILL FORNEY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, formerly known
as FEDERAL POWER COMMISSION,
Respondent,
UNITED GAS PIPE LINE COMPANY,
Intervenor.

**Opinion on Rehearing on Petition for Review of Orders of
the Federal Power Commission**

(February 9, 1978)

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge: These proceedings come before us for rehearing involving a review of opinions rendered by the Federal Power Commission (FPC) finding that the petitioners (McCombs Group) had violated two sections of the Natural Gas Act, 15 U.S.C. §§ 717f(b) and 717f(f) by failing to deliver natural gas to United Gas Pipe Line Company (United) under a producer's certificate authorizing the sale and continued sale of gas in interstate commerce. The pivotal dispute is whether the certificate was in force and effect or whether it had been abandoned prior to these proceedings. The FPC found that there had been no aban-

donment. In *McCombs v. Federal Power Commission*, 542 F.2d 1144 (10th Cir. 1976), authored by Judge Seth, the orders of the Commission involved here were set aside. However, this court granted the Commission's petition for rehearing. Thereafter, on October 18, 1977, this court directed and ordered that the opinion and judgment of October 18, 1976, *supra*, be withdrawn and vacated. We will refer to and quote from the prior opinion which has been vacated and withdrawn, however, inasmuch as it is reported in 542 F.2d 1144, *supra*.

In 1953, the leaseholders-producers of the Butler B lease covering a 163 acre tract situate in Karnes County, Texas, entered into a Gas Purchase Contract with United whereby the producers agreed to sell to United all natural gas produced then or thereafter from the tract. The producers applied to the FPC for producer certificates which were granted on December 8, 1954, authorizing the sale of the natural gas in interstate commerce.

The Butler B lease was assigned on various occasions prior to June 19, 1963, when the FPC terminated the 1954 certificates and issued a new certificate authorizing one H. A. Pagenkopf, then the Butler B lease assignee, to continue the service. This operator assigned the Butler B lease to one Louis H. Haring (Haring), et al., effective March 1, 1966. Haring appointed Bay Rock Corporation (Bay Rock) to operate the properties. At that time one well only had been completed on Butler B at a depth of 2,900 feet. It was not then producing. Haring-Bay Rock attempted to re-establish production from this well but those efforts failed for the most part and all production from the well and the lease terminated on May 28, 1966.

On December 5, 1966, Haring and Bay Rock informed United that production had ceased, that the gas reserve was depleted from the well and that there was no gas available for sale at that time. No deliveries of gas had been made to United since September 16, 1966. Following the notification that gas from the well was depleted, United

wrote Bay Rock that it planned to remove its measuring station which had been used to measure gas delivered to it from the well on the Butler B lease but that if, at some future date, further gas should become available from the properties subject to the 1953 contract, United should be informed so that it could arrange to reinstall the measuring equipment. United then removed the measuring equipment. Haring testified that he then considered the 1953 contract terminated.

Haring thereafter assigned his working interest rights, as successor lessee, to certain sands or reservoirs between depths of 8,700 to 9,700 feet. By means of unitization, the McCombs Group (Group) acquired the right to drill into these deeper depths involving the Butler B lease and an adjoining tract known as the Butler A lease, consisting of some 150 acres. Thereafter, the Group drilled and completed four producing gas wells from the deeper depths. One other company, National Exploration Company (National) which had previously acquired the Haring working interests in the west 50 acres of the Butler B lease covering depths of 4,115 feet to 8,700 feet had completed two producing gas wells. United contacted National in April of 1972 relative to purchasing the gas from these two wells. National then first became aware, in examining title documents in anticipation of sale of the gas, of United's 1953 purchase contract. National informed United that the gas from its two wells may be subject to United's 1953 Gas Purchase Contract. It was then that United undertook a title search concerning the Butler B tract. In May, 1973, United learned of its interest under the 1953 contract.

Haring did not at any time inform the Group of United's 1953 Gas Purchase Contract. He considered that contract terminated when production ceased from the single producing well on May 26, 1966. When he transferred his working interest rights to the deeper horizons in the Butler B lease to the Group, Haring did not believe that United had any further right or claim to gas which may be there-

after produced from the lease. The Group, before drilling, relied upon a 1967 title opinion which did not reflect any interest which United might have in the Butler B tract. After the Group realized production from its first well drilled on the Butler A tract in 1971, it contacted United, together with other prospective gas purchasers, relative to negotiations for sale of the gas. United wrote the Group on November 19, 1971, inquiring with regard to how the Group had acquired its interests in the leases. There is nothing in the record which casts any light on the negotiations. However, the Group did obtain a new title opinion on December 7, 1971, which for the first time disclosed to the Group United's 1953 Purchase Contract relating to the Butler B lease. Thereafter, in February, 1972, the Group discovered commercial gas from another well drilled on the Butler A tract. A title opinion of May 31, 1972, did not disclose any interest of United therein. In June of 1972, the Group concluded successful negotiations whereby it agreed to sell all of the gas it purchased from the Butler A and B leases to E. I. duPont deNemours & Company for industrial uses in intrastate commerce.

The Group successfully completed two more gas wells on the unitized tracts. Thereafter, on June 6, 1973, United notified the Group that it claimed all of the gas being produced from these tracts under and by virtue of its 1953 Gas Purchase Contract. The Group thereupon initiated a declaratory judgment action in the district court of Karnes County, Texas, against United. The action was removed to federal district court. On October 9, 1973, United filed a complaint with the FPC. Our reported opinion in *McCombs v. Federal Power Commission, supra*, detailed those proceedings leading to the Commission's adoption of the administrative law judge's conclusion that "the service authorized and the gas supply dedicated [under the original certificate involved here] include any and all gas produced from the Butler B acreage" and that, consequently, the intrastate sale to duPont was violative of the Natural

Gas Act. The administrative law judge further found that however negligent United may have been in asserting its rights under the 1953 Gas Purchase Contract and however innocent the Group may have been, that, notwithstanding, the Group should be ordered to cease and desist from continuing sales to duPont.

The basic matter for our determination of this rehearing relates to the issue of abandonment. The Commission held that there can be no abandonment of a certificate authorizing interstate service absent strict compliance with the requirements of petition, notice, hearing and establishment of cause for abandonment as required under 15 U.S.C.A. § 717(b) and § 717f(b).

Additional facts relating to the matter of abandonment set forth in our reported opinion in *McCombs v. Federal Power Commission, supra*, are appropriate here:

To consider again some of the facts outlined above as they relate to this issue, the one producing gas well on the Butler B lease ceased producing early in 1966. The lease was assigned by Pagenkopf effective in March 1966, and the assignee, Haring, attempted to work over the well. During this work, about 3,000 Mcf was produced, but all production again ended in May 1966. The operator for Haring advised the gas purchaser, United, in December 1966 that the well was depleted. United thereafter in 1966 removed the equipment it had connected to the well. Thus, the only producing gas well was abandoned in the fall of 1966. The operator and the purchaser recognized that there could be no more gas delivered from the well. This was a physical fact beyond the control of either of them, and they recognized the realities of the situation. The operator or owner had tried to restore production but was unable to do so. The sellers and buyers wished to continue the sale and purchase of gas but could not do so. The record does not show that any gas was ever pro-

duced thereafter from this original well. The witness Haring who was the owner who attempted the work-over, and who was a petroleum geologist, testified:

"Certainy I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, as far as I know, neither United nor anyone else was aware of its existence."

In August 1968, the FPC wrote a letter to Pagenkopf suggesting that he file an application for abandonment. By an undated letter the Commission made a similar suggestion to the operator for Pagenkopf's successor, Haring. The FPC thus twice recognized that there had been no production for an extended time, and recognized that the abandonment should be formalized for its records. This must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record. The records of the FPC as to this matter have apparently been destroyed under its procedures; consequently, it is not known what they may have indicated as to abandonment. The Commission in Opinion No. 740 in footnote 2 states as to the original proceedings for certification: "Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964." It is apparent however from the testimony that no operator or owner filed a formal application to abandon.

542 F.2d at p. 1148.

In that same opinion we further observed and held:

Thus we have a situation where there was an abandonment as a recognition of the indisputable physical facts beyond anyone's control. The Commission participated in this recognition as there were at least two suggestions by the Commission that someone file something to tidy up the records. These letters from

the Commission must be taken, in view of the destruction of the supporting records, to be an acknowledgment that there was an abandonment. It is difficult to see how a formal application, and a decision by the Commission could have added anything to these letters. In these circumstances, we must hold that there was an abandonment which was recognized by the Commission, and its jurisdiction ended.

Thus we must hold as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act. This being a matter of law, we do not consider it within the expertise of the Commission.

The "abandonment" we refer to is that contemplated under Section 7(b) of the Act, as above indicated. This is the only "abandonment" which is applicable to these circumstances. Section 7(b) refers to "service rendered," and the ordering of further "service" would have been a futile gesture. The seeking of an application by the Commission was a recognition of the fact that no more gas could be delivered from the only gas well, and that the "service rendered" had long since ceased contrary to everyone's wishes. This action by the Commission thus could only have reference to Section 7(b).

542 F.2d at pp. 1148, 1149.

We know of no opinion dealing with a factual situation similar to that presented here. In light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production from the Butler B leasehold on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act.

I.

FPC contends that § 7(b) of the Natural Gas Act [15 U.S.C.A. § 717f(b)] is explicit in requiring that prior Com-

mission approval must be obtained by any natural gas company before it can abandon any "facilities," or "service" involving the transportation and resale of gas dedicated by certificate to sale in interstate commerce. The full text of § 7(b) is as follows:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that present or future public convenience or necessity permit such abandonment.

To be sure, just as we previously recognized in *McCombs v. Federal Power Commission*, *supra*, the decisions are abundant and clear on the point that in those cases where the supply of natural gas is not depleted, the service must be continued via the facilities authorized. Obviously, there could be no finding by the Commission that the available supply of natural gas has been depleted under such circumstances. *United Gas Pipe Line v. Federal Power Commission*, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1966); *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960); *Sun Oil Co. v. Federal Power Commission*, 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639 (1960); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959); *Phillips Petroleum Co. v. Federal Power Commission*, 556 F.2d 466 (10th Cir. 1977); *Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co.*, 486 F.2d 315 (8th Cir. 1973); *Valley Gas Co. v. Federal Power Commission*, 159 U.S.App.D.C. 311, 487 F.2d 1182 (1973); *J. M. Huber Corp. v. Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956); *Panhandle Eastern Pipe Line*

Co. v. Michigan Consolidated Gas Co., 177 F.2d 942 (6th Cir. 1949). These decisions support the proposition advanced by this court in *Harper Oil Co. v. Federal Power Commission*, 284 F.2d 137 (10th Cir. 1960):

It would thus seem clear that once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder so long as production continues. [Citing to *Sun Oil Co. v. F. P. C.*, 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639.]

284 F.2d at p. 139.

We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission. Abandonment in the context of the facts and circumstances of this case cannot be equated with a voluntary "giving up" of valuable rights and/or property in the usual sense of relinquishment or surrender. Rather, the abandonment here presents the very practical recognition that there was no *service* to be rendered following the depletion of gas on December 5, 1966, from the Butler B leasehold. All parties recognized that for a period of five years thereafter no *service* could be rendered because the known gas reserves were depleted. These *facts* were acknowledged by all of the parties, including the Commission. Thus, the only known reserves of natural gas for which applications for certification had been made and authorized had been depleted. With its depletion and the subsequent five year period of non-service, there was no need for the formality of a Section 7(b) hearing. This is so because, in our view, all parties, including the Commission, considered that there were no gas reserves available following cessation of production and the subsequent efforts to restore production by workover methods in order to *service* the

public consumer, and, of course, to profit from the discovery and sale.

At oral argument, the FPC contended that the certificate originally granted authorized and dedicated all gas without regard to depth or sand/reservoir limitations, to sale in interstate commerce and that there cannot be an "abandonment in fact." The FPC further argued that its expertise is required as a prerequisite to any abandonment in that a formal hearing may or might see the presentation of expert evidence by the Commission that further reserves of natural gas are likely to exist at other depths, zones, reservoirs, etc., underlying the subject leasehold. Nevertheless, counsel for the Commission did acknowledge that in factual instances such as those presented here, proof of depletion and efforts to resurrect production by workover attempts have been acceptable evidence of depletion of gas for purposes of abandonment orders under Section 7(b).

The Commission urges that *Mitchell Energy Corp. v. Federal Power Commission*, 533 F.2d 258 (5th Cir. 1976) controls. That opinion held that although the 1949 contract between the gas producer and gas purchaser which dedicated all gas from the seller's interest in leaseholds and units in a particular field had expired in 1973, that nevertheless the successor in interest to the original producer was bound to dedicate the gas to interstate commerce because the successor assumed, as a matter of law, the original producer's obligations. That simply is not the case before us here. There had been no cessation of production in *Mitchell* and certainly no *depletion* of known reserves. *Mitchell* is not at variance with those decisions we have heretofore cited for the proposition that once natural gas is dedicated to interstate commerce it cannot be withdrawn from service in interstate movement without prior Section 7(b) FPC approval.

Our holding that strict compliance with the non-abandonment language of 15 U.S.C.A. § 717f(b), *supra*, does not

control under the facts and circumstances here is, we believe, buttressed by certain language contained in *Union Oil Co. of California v. Federal Power Commission*, 542 F.2d 1036 (9th Cir. 1976). At issue there was the FPC requirement that all producers of natural gas dedicated to interstate commerce annually submit a Form 40 containing detailed information about their natural gas reserves. The Court rejected the FPC contention that the reporting burden on the producers was outweighed by the Commission's need to have the reservoir data. The Court stated, in pertinent part:

There is no evidence from which the FPC could conclude that the data required on Form 40 on a by reservoir basis were or could easily become available. The only evidence is to the contrary . . . Although there was no evidence before the Commission to contradict the unanimous statements of the producers that natural gas reserve data are not kept by them on a 'by reservoir' basis and that such data would be extraordinarily expensive to obtain, the Commission majority found that '[T]here is little doubt that the information required . . . is possessed by the respondents.' . . . This assertion is simply wrong . . . The Commission's factual determination that the data required are available is not supported by any evidence, much less by substantial evidence.

542 F.2d at p. 1042.

We conclude that the abandonment of the service in the instant case was accomplished, as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

We direct that all orders included in the Commission's Opinions Nos. 740, 740-A, and 740-B be set aside. We remand with directions that other pending proceedings in the Commission's Docket No. CP74-94 based on such orders be terminated and that the proceedings be dismissed.

IT IS SO ORDERED.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. While the equities favor the McCombs Group, duPont and National, usual contract rules and equitable considerations do not control in this proceeding under the Natural Gas Act, in my opinion. Instead, there are mandatory statutory requirements on abandonment of service which were imposed to protect the public interests recognized by the Act, *Sunray Oil Co. v. FPC*, 364 U.S. 137, 143, 80 S.Ct. 1392, 4 L.Ed.2d 1623, and these provisions convince me that we should affirm the basic holding of the Commission in this case.¹

The majority opinion reasons (p. 1380) that: there was an abandonment in fact after all production ceased in 1966 on the Butler B lease from then known productive formations, as recognized by the Commission and the parties; that with this recognized abandonment the Commission's jurisdiction ended; and that this abandonment was sufficient, as a matter of law, under § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), and this being a matter of law, it was not within the expertise of the Commission.

To me these conclusions are directly contrary to the plain terms of § 7(b). The statute could hardly be clearer in saying that:

¹ The majority opinion does not reach other issues raised such as the propriety of the ruling on dissolution of the units and of the order requiring repayment to United of quantities of gas sold to duPont in the intrastate transaction, and the failure to sustain the motion challenging jurisdiction as to duPont. Thus it is unnecessary for me to address these issues. I will consider only the holding of the majority on the central abandonment issue.

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, *without the permission and approval of the Commission first had and obtained*, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (Emphasis added).

It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does a determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b). As the Supreme Court pointed out in *Sunray*, supra, 364 U.S. at 158 n.25, 80 S.Ct. at 1404:

²⁵ It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b).* The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants. (Emphasis added).

See also *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 389, 79 S.Ct. 1246, 3 L.Ed.2d 1312; *Phillips Petroleum Co. v. FPC*, 556 F.2d 466, 469 (10th Cir.); *Mitchell Energy Corp. v. FPC*, 533 F.2d 258, 261 (5th Cir.).

The majority lays stress on the fact that production from the known reserves underlying the Butler lease was depleted in 1966, that there was testimony that neither United, the producer, nor anyone else was then aware of deeper reserves, and that as a practical matter there was no service that could be rendered thereafter from that lease. And, as the majority says, counsel for the Commission conceded that proof of such depletion and of failure of efforts to re-establish production has been accepted by the Commission in § 7(b) proceedings as a basis for permission for abandonment. Further the Commission did twice write suggesting that an application for abandonment be filed, which action the majority interprets as Commission recognition that there was in fact an abandonment.

However, there were other reserves as is now known, and United did state that while it would remove its metering equipment in 1966, it would reinstall such equipment whenever further gas might be delivered under the contract. (J.A. 137). In view of these circumstances it may not be quite certain what would have happened if application for a complete abandonment had been made, notice thereof had been given by publication,² and a final abandonment approval had been considered by the Commission. But, in any event, permission for abandonment of all service was for the Commission and we cannot make the findings and give the approval which Congress deemed it nec-

² The Commission's regulations required notice by publication and mailing to States affected by the application, see 18 CFR § 157.9 (January 1, 1969), and permitted petitions for interventions by persons desiring to participate. See 18 CFR § 157.10 (January 1, 1969). Pipeline purchasers have been permitted to intervene in such proceedings. See *e. g.*, *Transcontinental Gas Pipe Line Corp. v. FPC*, 160 U.S.App.D.C. 1, 2-3, 488 F.2d 1325, 1326-27, cert. denied sub nom. *Natural Gas Pipeline Co. v. Transcontinental Pipe Line Corp.*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed.2d 226.

essary for the Commission to make. *Sunray*, supra, 364 U.S. at 142, 80 S.Ct. 1392.

The Commission noted in its Opinion 740 that the original 1953 contract covered merchantable natural gas produced from all wells now or hereafter drilled during the 10-year term of that contract (later extended to 1981) on specified leaseholds including the Butler B tract, and further noted that there was no mention of any particular depths in that contract. (J.A. 160-61). Further, the McCombs Group now does not contest the fact of delivery of gas from the Butler B lease to United.³ Such delivery constituted both a sale under the contract and commencement of a "service" obligation in interstate commerce under the Act. *Phillips Petroleum Co. v. FPC*, supra, 556 F.2d at 469. As this delivery was made under a contractual dedication without limits as to depths, there was a dedication to interstate commerce of the underlying reserves in question, and the effort to resell the same gas amounted to an attempted abandonment, which could not be done without first obtaining approval of the Commission under § 7(b). *Ibid.*

For these reasons I would sustain the Commission's conclusion that the commencement of service completed dedication to United in interstate commerce and thereby invoked the protection of § 7(b). (J.A. 163). And concluding that procedures made mandatory by the Act have not been complied with, I must dissent.

³ The McCombs Group says that the statement by United indicating that the record shows that gas was received by United from the Butler B lease should be read with some caution. The McCombs Group points to the absence of evidence in the original record that gas was actually delivered from the Butler B lease to United, but recognizes that United later presented some evidence on the point in subsequent proceedings before the Commission. The McCombs Group states that since it is not seeking merely a remand, it has not raised the delivery of Butler B gas to United as an issue in this review proceeding, except as evidence of the Commission's partiality toward United. (Reply Brief of McCombs Group, 2).

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1976):**(b) *Review of Commission order***

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the

additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.